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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **SUPERIOR COURT DEPARTMENT**
NO. 19-1980-B

LAWYERS FOR CIVIL RIGHTS INC.,

Plaintiff,

v.

CITY OF BOSTON, BOSTON POLICE DEPARTMENT, SHAWN WILLIAMS & MARTHA DEMAIO

Defendants

Notified 03.03.20 (VJ)
-B$G/D.S.G.,
-LCR/S.L.H.
-CBLD/E.R., N.M.O.

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants, City of Boston, Boston Police Department, Shawn Williams, and Martha DeMaio ("Defendants"), hereby move this Court pursuant to Mass. R. Civ. P. 12(c) to dismiss Plaintiff's Complaint on grounds that Plaintiff has failed to demonstrate the need for a permanent injunction, which is the only remaining relief requested by Plaintiff in this action.[1] Plaintiff alleges that it needs a permanent injunction to force the City to comply with the public records law in a timely fashion in the future, but it has failed to demonstrate any irreparable harm or that there is an inadequate remedy available at law.

In further support of this Motion, Defendants respectfully refer the Court to their Memorandum of Law, filed herewith.

[1] Plaintiff's Complaint alleges that the City violated the Massachusetts public records law by failing to respond to its January 2019 public records request. Since the filing of Plaintiff's Complaint, however, the City has produced all responsive records in its possession, custody or control. In light of this, the Plaintiff has agreed not to move forward with its request for declaratory relief.

Notify

04/28/20

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 19-1980-B

Notified 030320(ND)
- B3G/D.S.G.
- LCR/S.L.H.
- CBLD/E.R., N.M.O.

LAWYERS FOR CIVIL RIGHTS, INC.,
Plaintiff,

vs.

CITY OF BOSTON, et al.,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON MOTION TO DISMISS

Lawyers for Civil Rights, Inc. ("LCR") sued the City of Boston ("City") and other related parties,[1] seeking declaratory and injunctive relief[2] based upon the Boston Police Department's ("BPD") alleged regular practice of violating the Massachusetts Public Records Law, G.L. c. 66, §§ 10, et. seq. (the "Public Records Law") by failing to produce responsive public records within the timeframe prescribed by law. The defendants moved for judgment on the pleadings, and this Court heard oral argument on January 30, 2020. For the below reasons, the defendants' motion must be **DENIED**.

RELEVANT ALLEGATIONS FOR PURPOSES OF THE MOTION TO DISMISS

The City is a municipal corporation and political subdivision of the Commonwealth. Complaint at ¶ 6. BPD is an entity acting under the City's authority. *Id.* at ¶ 7. At all relevant times, Williams and DeMaio were employed as Records Access Officers, Williams' position

[1] The other defendants are the Boston Police Department, a subdivision of the City, and Shawn Williams and Martha DeMaio, public records officers who are being sued in their official capacities. It appears that these defendants could be dismissed without any prejudice to LCR.

[2] As a result of discussion between the parties, which this Court commends, LCR has narrowed its request for relief to injunctive relief.

being with the City and DeMaio's being with the BPD. *Id.* at ¶¶ 8-9. The defendants are custodians of records for purposes of G.L. c. 66 § 10. *Id.* at ¶ 10.

LCR sent BPD a request for records regarding the "racial and gender impact of BPD employment practices" on January 4, 2019. *Id.* at ¶¶ 18-19; Ex. 1. BPD acknowledged receipt of the records request on January 15, 2019, but BPD did not indicate when it would respond. *Id.* at ¶ 20; Ex. 2. Despite subsequent assurances from BPD, and follow-up communications with LCR, BPD failed to produce responsive records for 167 days (116 of which were business days). *Id.* at ¶¶ 18, 21; Ex. 3.

BPD's failure to produce responsive records in a timely manner in this case "is not an isolated event." *Id.* at ¶ 22. In December 2014, LCR requested records from BPD related to the "hair drug test" BPD administers, however, BPD did not produce any responsive documents. *Id.* at ¶ 24. In December 2015, LCR filed another records request, seeking information on the racial and gender demographics of BPD's Recruit class, but, BPD did not produce responsive documents. *Id.* at ¶ 25. In January 2016, LCR filed a civil suit in Suffolk Superior Court to compel the production of records responsive to LCR's December 2014 and December 2015 requests. *Id.* at ¶ 26. BPD only produced responsive records upon being served with LCR's lawsuit. *Id.* Further, in 2019 BPD failed to respond to 18 of 23 public record requests for which the Supervisor of Records[3] had ordered BPD to produce requested records. *Id.* at ¶ 27. Those decisions by the Supervisor of Records note that BPD failed to respond to a requestor's initial request and follow-up attempts. *Id.*

[3] The Supervisor or Records is an official in the Division of Public Records within the Office of the Secretary of the Commonwealth who reviews certain public records requests to determine whether a state entity has complied with the Public Records Law in withholding requested records. See G.L. c. 9, § 4; G.L. c. 66, §§ 10(c)-(d); 950 CMR 32.06(4).

Access to public records in a timely manner increases government transparency and permits community members to hold government accountable on an ongoing basis. *Id.* at ¶ 3. Access to information about diversity and inclusion measures for BPD is particularly important because BPD has failed to keep pace with the growing diversity in Boston. *Id.* at ¶ 4. BPD's failure to respond to LCR's requests for public records in the timeframe set forth by statute is "part of a regular practice of failing to adhere to the statutory time requirements." *Id.* at ¶ 27. There is reasonable basis and likelihood that this conduct will continue unless enjoined by a court. *Id.* at ¶ 35. Injunctive relief is therefore "necessary to serve the public purposes underlying the timeframe set forth in the Public Records Law, and there is no other adequate remedy at law." *Id.*

DISCUSSION

A. The Legal Standards

1. Motion to Dismiss

A motion to dismiss, "argues that the complaint fails to state a claim upon which relief can be granted." Jarosz v. Palmer, 436 Mass. 526, 529 (2002), quoting J.W. Smith & H.B. Zobel, Rules Practice s. 12.16 (1974). In considering such a motion, the Court takes as true the allegations of the complaint, as well as such inferences as may be drawn from them in favor of the non-moving party. Nader v. Citron, 372 Mass. 96, 98 (1977). However, the court disregards legal conclusions cast in the form of factual allegations. Shaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). To survive the motion, the complaint must contain "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief, and "must be enough to raise a right to relief above the speculative level." Iannocchino v. Ford Motor Co., 451 Mass. 623, 636 (2008),

quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007). A "formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555.

2. Permanent Injunction

To obtain a permanent injunction, LCR must show (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." See Monsanto Co. v. Gertson Seed Farms, 130 S. Ct. 2743, 2747-2748 (2010). In crafting a permanent injunction, the trial judge has discretion as to the nature and scope of the enjoined conduct. Commonwealth v. Adams, 416 Mass. 558, 566 (1993).

B. Application of the Legal Standards

The defendants have moved to dismiss LCR's claims on two grounds. First, they argue that LCR cannot demonstrate irreparable harm because it has received the requested documents upon filing this case, and any future harm is speculative. Def. Br. at 4-5. Second, they argue that existing statutory remedies under the Public Records Law are fully adequate to redress the harms LCR alleges. *Id.* at 5. These arguments understate the nature of LCR's alleged injury and the legal consequences for purposes of a dismissal motion of alleging a pattern and practice of belatedly producing public records.

1. Alleged irreparable harm.

LCR has alleged that BPD engages in a "regular practice" of failing to respond to public records requests in a timely manner. This alleged regular practice by BPD includes failing to respond to LCR's requests to produce records on racial and gender data until LCR filed suit, three times between December 2014 and 2019. This alleged regular practice also includes

failing to respond to other public records requests at least 18 times in 2019, requiring the Supervisor of Records to order their production. See *supra* at 2-3.

In similar circumstances, a federal appeals court reversed the dismissal of a lawsuit seeking injunctive relief under the Freedom of Information Act ("FOIA"), the federal counterpart to the Public Records Law, because the plaintiff had alleged a pattern and practice of delayed responses to FOIA requests by a government agency. See Judicial Watch, Inc. v. Dep't of Homeland Sec., 895 F.3d 770 (D.C. Cir. 2018). In Judicial Watch, Judicial Watch, Inc., a nonprofit, alleged on information and belief that "the Secret Service... has a policy and practice of violating FOIA's procedural requirements by regularly failing or refusing to produce requested records or otherwise demonstrate that [they] are exempt from production within the time period required by FOIA," causing it irreparable harm." 895 F.3d at 777. As described by the District of Columbia Court of Appeals ("D. C. Circuit"), plaintiff's complaint alleged that the Secret Service has "an informal practice, harmful to Judicial Watch's mission and work," of repeatedly withholding records for an unreasonable period of time. *Id.* at 779. The D. C. Circuit recognized, as had the federal district court in dismissing the lawsuit, that FOIA lawsuits generally become moot once an agency has made available the requested non-exempt records. *Id* at 777. However, contrary to the district court ruling dismissing the lawsuit, the D. C. Circuit held:

> So long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials, a party's challenge to the policy or practice cannot be mooted by the release of the specific documents that prompted the suit.

Id. at 778. Even though there was no pending records request to which the Secret Service had not responded, the court found that the allegations asserted a "cognizable danger of

recurrent violation," *id.* at 783, which if established would provide the grounds for injunctive relief including irreparable harm.

LCR's allegations of repeated delays by BPD in providing requested information pursuant to the Public Records Law, and the alleged harm caused by this delay, closely resemble the allegations in Judicial Watch. Indeed, the irreparable harm caused by delay may be greater here, because there are only limited times during the year when members of the public may advocate to the BPD for changes in policies and practices related to racial and gender equality. See Plt. Br. at 8. These alleged harms are "irreparable" if LCR has permanently been denied an opportunity for meaningful public input at particular points in time.

The legislative intent in passing the Public Records Law, and subsequent amendments to the law, support the conclusion that LCR's alleged injuries suffice to withstand a motion to dismiss. In Suffolk Const. Co., Inc. v. Div. of Capital Asset Mgt., 449 Mass. 444, 454 (2007), the Supreme Judicial Court noted that G.L. c. 66 § 10 reflects the "Legislature's considered judgment that [t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner, and that [g]reater access to information about the actions of public officers and institutions is increasingly...an essential ingredient of public confidence in government." *Id.* at 453 (citations and internal quotations omitted). Further, three years after the law's enactment, the Legislature reduced the timing in which a response is statutorily required from 20 days to 10 days. See Globe Newspaper Co. v. Commissioner of Education, 439 Mass. 124, 131 n.11 (2003). Thus, the purpose and amendment of the Public Records Law support the Court's holding that LCR's alleged injuries are sufficient to survive a motion to dismiss.

2. Alleged inadequacy of remedies in Public Records Law

Defendants argue that LCR cannot bring a claim for injunctive relief because the Public Records Law provides all of the relief to which LCR is entitled: namely, a requirement that all responsive non-privileged response records be produced, in addition to "reasonable attorneys' fees and other litigation costs." See Def. Br. at 5, citing Auburn News Co., Inc. v. Providence Journal Co., 659 F.2d 273, 277 (1st Cir. 1980). This argument ignores that courts will grant injunctive relief when they determine that past violations of a statute are likely to continue. See Commonwealth v. Adams, 416 Mass. 558, 566 (1993) (injunction warranted against police officers based on past violation of citizens' rights); Judicial Watch, see *supra* at 5. Significantly, reasonable attorneys' fees and other litigation costs were available to the plaintiff in Judicial Watch, see 5 U.S.C. § 552(a)(4)(E), however, that did not prevent the court from denying the agency's motion to dismiss based on the plaintiff's plausible allegations of a practice of delay. The Public Records Law explicitly states that "the superior court shall have jurisdiction to enjoin agency or municipal action." G.L. c. 66, § 10A(d)(1)(i).

As the D.C. Circuit noted in Judicial Watch, allegations of delay, even if substantiated, do not necessarily entitle a records requestor to injunctive relief. As the court noted:

> Unexplained agency delay still requires the district court to determine whether the agency's conduct in failing to conform to FOIA's procedural requirements demonstrates a lack of due diligence and is so delinquent or recalcitrant as to warrant injunctive relief because ordinary remedies, such as a production order... would be inadequate to overcome an agency policy or practice.

Id. at 783. At this stage of the proceedings, the question is not whether LCR ultimately will be entitled to injunctive relief, but whether LCR's allegations plausibly suggest an

entitlement to relief and rise above the speculative level, Iannocchino, 451 Mass. at 636, which they do.

CONCLUSION AND ORDER

For the above reasons, Defendants' Motion for Judgment on the Pleadings (Docket # 9) is **DENIED**.

Dated: February 27, 2020

Robert L. Ullmann
Justice of the Superior Court